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Issue Date: 21 June 2005

CASE NO.: 2004-LHC-1391

OWCP NO.: 06-157874

IN THE MATTER OF:

CARL V. LAROSA,

Claimant

v.

KING AND COMPANY,

Employer

and

U.S. FIDELITY & GUARANTY, CO.,

Carrier

APPEARANCES:

BEN E. CLAYTON, ESQ.

For The Claimant

DONALD P. MOORE, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER
ON SECTION 22 MODIFICATION

This is a claim for Section 22 Modification of compensation benefits under Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq. (herein the Act), brought by Carl V. LaRosa (Claimant) against King and Company (Employer) and U.S.

Fidelity & Guaranty Co. (Carrier).

On August 19, 1996, a Decision and Order was originally filed in this matter wherein Claimant was found temporarily totally disabled from November 15, 1993 to June 7, 1995, based on an average weekly wage of $559.67 for a compensable injury to his right ankle. Claimant was found permanently partially disabled starting June 7, 1995, and was awarded 61.5 weeks of scheduled disability benefits for his 30% impairment rating based on his average weekly wage of $559.67. Employer was ordered to provide all reasonable and necessary medical expenses arising from the November 15, 1993 work injury.

A modification hearing was held on March 9, 2005, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 8 exhibits, Employer/Carrier proffered 17 exhibits which were admitted into evidence, and the parties submitted one joint exhibit.[1] This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant on April 28, 2005, and from Employer/Carrier on May 2, 2005. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on November 15, 1993.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

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[1] Employer/Carrier proffered 18 exhibits at formal hearing and withdrew its Exhibit No. 15 on April 25, 2005.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.; Claimant's Exhibits: CX-____; Employer/Carrier Exhibits: EX-____; Joint Exhibit: JX- 1.

4. That Employer was notified of the accident/injury on November 15, 1993.

5. That Employer/Carrier filed a Notice of Controversion on March 23, 1994.

6. That Claimant received temporary total disability benefits from November 15, 1993 to June 6, 1995, at a compensation rate of $373.11 for 81.2 weeks. Claimant also received temporary total disability benefits from June 26, 1997 through March 15, 1998 at a compensation rate of $373.11 for 38 weeks. Claimant also received permanent partial disability benefits for 61.5 weeks at a compensation rate of $373.11 for a 30% permanent impairment to his foot.

8. That Claimant's average weekly wage at the time of injury was $559.67.

9. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act, with the exception of the most recent medical bills of Dr. Brunet.

10. That Claimant reached maximum medical improvement on September 11, 1997.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether modification is proper under Section 22 of the Act.

2. The nature and extent of Claimant's disability.

3. Employer/Carrier's entitlement to a credit for overcompensation.

4. Attorney's fees and expenses.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was 48 years old at the time of formal hearing. He graduated from high school and has performed "hands-on" work since graduating. (Tr. 26). He performed a three year

apprenticeship at Delgado Community College and became a painter. (Tr. 60). The carpentry work that he performed, when injured, was through the local union and involved walking and standing for ten to twelve hours. (Tr. 27).

Claimant indicated that Dr. Brunet did not think he could work as a carpenter, but agreed to let him try. (Tr. 28). Claimant has not "given up" on carpentry, although he cannot perform carpentry work at his former capacity. (Tr. 28). Specifically, he used to be a "heavy construction carpenter," but he can no longer sustain working forty to fifty hours each week. (Tr. 29). Claimant testified that he "knows what [he] can do and [he] knows what [he] can't do." (Tr. 30).

The number of hours Claimant is able to work on a typical day, due to his ankle condition, depends on how long he is standing, how far he is walking, and how much ladder climbing he must perform. He can work well on flat surfaces and when putting weight on his hands. (Tr. 30).

On May 6, 1999, Claimant informed Dr. Brunet that he injured his back while bending over all day at work. (Tr. 72; EX-6, p. 42). Claimant did not recall Dr. Brunet recommending vocational retraining for his ankle injury at the May 1999 visit, but testified that it could have "went in one ear and out the other." (Tr. 73).

In February 2001, Dr. Brunet informed Claimant that he could perform "some vocation."[3] Dr. Brunet indicated Claimant could perform carpenter work on flat surfaces.[4] (Tr. 31). Claimant further testified that Dr. Brunet took him off work; thus, he could not put his name on the "out-of-work list" at the union hall. (Tr. 32). When Dr. Brunet informed Claimant that he could not work, he tried to get "disability dues" with his union. (Tr. 69). In April 2004, Dr. Brunet released Claimant to return to work and Claimant again put his name "on the list" at his local union.

On cross-examination, Claimant agreed that Dr. Brunet told him "way back" that he probably could not work as a carpenter. However, Claimant went through a work hardening program to continue being a carpenter. (Tr. 68). Claimant was aware that

[3] Claimant testified that he had to pay for all but the last two of his doctor visits. He stated that he asked the receptionist about authorization for his treatment on each visit, but "nothing was paid." (Tr. 32).

[4] Dr. Brunet also recommended Claimant see a hand specialist for a left hand injury sustained while working at an "exhibition hall." (Tr. 72).

Dr. Brunet placed restrictions on his walking and standing activities. (Tr. 68). He testified Dr. Brunet has never informed him that he was "vocationally disabled," but told him that he had to stop the work he was doing in February 2001. (Tr. 68). He further testified that he had not seen Dr. Brunet's report dated February 12, 2001, which states he was "vocationally disabled." (Tr. 70; EX-6, p. 35).

On March 29, 2001, Dr. Brunet's report states that Claimant was "unable to work at his usual job being a carpenter or roofer" and that Claimant was "disabled and unable to work at his current profession." Claimant agreed that the report indicated he was only disabled from the carpentry profession. He further testified that the paper provided to his union stated he could perform "no work." (Tr. 71).

Claimant testified that the "quality of [his] comfort" was better at the time of the instant hearing than it was in 1995. However, he also testified that the "ankle itself" was worse at the time of the instant hearing. (Tr. 35-36). In 1997, Dr. Brunet removed the hardware from his ankle and reduced his impairment rating from 30% to 25%. (Tr. 35-36, 79). After standing for three to four hours, fluid gathers in his ankle joint and causes swelling. (Tr. 36-37). Claimant has difficulty in walking or being active. (Tr. 37). No doctor has suggested any "medical cause" for the swelling of his ankle, e.g., congestive heart failure. (Tr. 41).

Claimant's "home treatment" of his ankle consists of keeping the ankle elevated, having his ankle massaged, and drinking plenty of water to remain hydrated. (Tr. 39-40). He takes Ibuprofen on occasion. (Tr. 40). He testified that he tries to maintain a quality of life similar to that which he once had. (Tr. 39).

Claimant testified that he could work at a job that required standing without sitting for eight hours a day, five days a week because his leg will bother him regardless of whether he is sitting or standing. He testified that he will do what he has to do after being released to work by his doctor. (Tr. 43). However, he would feel repercussions from performing such activity. (Tr. 44).

Claimant stated he would never apply for the convenience stores jobs identified by Mr. Sanders. He stated he would not attempt to work for $6.00 an hour; rather, he will only work a job that is "able to meet the criteria of what [he] need[s] to

pay at home." (Tr. 44). Claimant indicated that his ankle would become symptomatic after about three or four hours of performing groundskeeper work. (Tr. 50).

On cross-examination, Claimant could not recall if he applied for any of the positions identified by Mr. Sanders in the 1995 vocational reports, but he did apply for a cabinetry job with "Norvell." (Tr. 60-61). Although he was told the position paid $10.00 per hour, Claimant was never told he was hired for the position. (Tr. 61). Regarding the more recent vocational reports from Mr. Sanders, Claimant did not apply for an available position with Advanced Auto Parts. (Tr. 62).

Claimant testified that he "might not be able to work at CarQuest" because he cannot operate a computer. He could operate a "weed whacker" or a lawnmower; however, he is not going to attempt such work because it would aggravate his leg and would require "trading off lesser money for the same symptoms." (Tr. 64-65).

In July 1999, Claimant applied for a job with Boh Brothers Construction Company through a referral from his union hall. (Tr. 51). Although he broke his ankle at work in 1993 and broke his wrist as a child, he indicated he never had any broken bones on a medical questionnaire. (Tr. 51, 53; EX-16).

In 1999, Claimant also indicated on a medical questionnaire that he did not have foot trouble after standing or walking for long periods of time. (Tr. 55; EX-8, pp. 2-3). He testified that he always checks "no" on questionnaires and could not recall whether he even read the questions. (Tr. 55). He stated he will check "no" for the rest of his life to such questions. (Tr. 56). He believes he was let go from jobs due to his injury and is willing to lie in order to provide for his family. (Tr. 54, 56).

Claimant served time in prison in 2001 due to a DWI. (Tr. 58). He testified that he is being pardoned as a first time offender. (Tr. 75). He has never had any legal problems other than traffic violations and DWIs. (Tr. 76). He further testified that he would not report "being a felon" on an application because he "would never put down there anything that would incriminate [him] as far as being able to earn an honest living." (Tr. 81).

Claimant has a pension plan through the carpenter's union hall and can only increase his pension time through union

referrals. At the time of the instant hearing, Claimant was on the "out-of-work list" with his union and had received job referrals through the union. (Tr. 45). He would perform "exhibition work" and would decline any offers for "heavy construction." (Tr. 46). He earns $20.00 an hour plus a benefits package when working through the union, which he estimated to average $24.00 an hour. (Tr. 48).

He would prefer to do union referral work at the union wage rate as opposed to convenience store work for $6.00 per hour, as he would be "standing up and doing the same thing with this leg" at either job. (Tr. 48-49). He testified that he must earn "decent money" as an "active participant" in the workforce. (Tr. 50).

In January 2005, Claimant worked for "GES."[5] (Tr. 65, 77). His employment with GES ended because it "ran out of work;" he was not terminated due to difficulties in physically performing the job. (Tr. 78). At the time of the instant hearing, Claimant was self-employed and performed carpentry and painting. (Tr. 65-66). He is paid for his labor and also does work for free. (Tr. 66). Since 1996, he has performed carpentry work during the times he was not working through the union. (Tr. 67).

Claimant's employment records indicate he was terminated from jobs through reductions in force (RIF), but his termination by Employer was not the result of a RIF. (Tr. 76). He has been denied requests for Social Security disability benefits on two occasions. (Tr. 78).

The Medical Evidence

Dr. Michael E. Brunet

Dr. Brunet, whose credentials were not contained in the record, was deposed by the parties on July 14, 2004. (EX-4). Dr. Brunet began treating Claimant in 1994 and was treating Claimant at the time of the original hearing in this matter. At that time, he assigned a permanent disability impairment rating of 30% to Claimant's ankle and concluded Claimant reached maximum medical improvement on June 7, 1995. (Decision and Order, pp. 7-8).

On May 22, 1997, Dr. Brunet referred Claimant to Dr. Kyle

[5] The record does not provide the full name of "GES."

Dickson, who opined that Claimant's symptoms would be reduced through removal of the "plate;" the removal was performed on June 26, 1997. (CX-1, pp. 74-75). On September 11, 1997, Dr. Brunet noted Claimant felt "much improvement" since removing the hardware, but indicated that he continued to experience "arthritic symptoms," stiffness, and pain. (CX-1, pp. 73-74). Dr. Brunet placed Claimant at MMI, noting that he "may improve to some degree." Dr. Brunet indicated Claimant could not return to his previous employment as a carpenter, although he could return to "some form of vocation." He further opined Claimant would be limited to "light to medium type work activity with some breaks from prolonged standing activity." He assigned a 25% impairment rating to Claimant's lower extremity. (CX-1, p. 74).

No change was noted on a January 8, 1998 visit with Dr. Brunet, although Claimant experienced ankle swelling with daily activity. (CX-1, p. 69). Claimant continued to present with similar complaints of pain and swelling on March 26, 1998, August 10, 1998, September 24, 1998, and on November 16, 1998.[6] (CX-1, pp. 54, 57-58) On March 26, 1998, Dr. Brunet opined Claimant could return to "light activity that does not require agility, prolonged walking or standing." (CX-1, p. 63). Dr. Brunet did not indicate a change in his opinions regarding MMI or the permanent impairment rating in August or September.[7] (CX-1, pp. 54, 57). In November 1998, he restricted Claimant to light work. (CX-1, p. 58).

On May 6, 1999, Claimant reported that he had attempted to work, but indicated it had become more difficult for him to "function."[8] Dr. Brunet diagnosed him with "traumatic arthritis of the ankle" and X-rays revealed "mild to moderate changes in the tibiotalar joint." Again, Dr. Brunet predicted Claimant would not be able to perform "heavy work." He suggested vocational retaining. (CX-1, p. 51). A work status report indicated Claimant could perform "sedentary/light" work. (CX-1, p. 48). On November 27, 2000, Dr. Brunet opined that "fusion" was Claimant's only option and a work status form restricted him

[6] On August 10, 1998, Claimant reported an attempt to return to "fairly vigorous" work and realized he could no longer perform such activities. (CX-1, p. 58).

[7] A handwritten note dated August 10, 1998, indicates Claimant's "current problem" had "regressed." A similar note dated September 24, 1998, indicates "no change" in Claimant's situation. (CX-1, pp. 61-62).

[8] Claimant also reported that he injured his back while "bending over" all day at work. His back x-rays appeared normal and Claimant declined to have a back examination performed by Dr. Brunet's partner. (CX-1, p. 51).

to sedentary/light work activities.[9] (CX-1, pp. 42, 44).

On February 12, 2001, Dr. Brunet opined Claimant was "vocationally disabled" and recommended a FCE. (CX-1, p. 34). A work status report indicated Claimant was "unable to work." (CX-1, p. 36). On March 29, 2001, Dr. Brunet opined Claimant was "disabled and unable to work at his usual profession." (CX-1, p. 30). On October 18, 2001, Dr. Brunet did not note any change in Claimant's condition and Claimant remained "off work." (CX-1, p. 27).

At his deposition, Dr. Brunet testified that the February 12, 2001 opinion of Claimant's vocational disability referred to Claimant being vocationally and physically disabled from performing "the type of work he enjoyed in the past." (EX-4, p. 15). He further agreed that Claimant "probably" could have worked within a light or medium level with limited standing and walking.[10] (EX-4, p. 16). Dr. Brunet agreed that his March and October 2001 opinions disabled Claimant from working at his usual profession, but not from performing other forms of work within his physical limitations. (EX-4, pp. 18-19). More specifically, Dr. Brunet agreed Claimant could have worked within the "physical limitations as previously outlined by [Dr. Brunet] or in the FCE of 1995 and within in his educational abilities." (EX-4, p. 19).

On January 25, 2003, Dr. Brunet noted Claimant lost 40 to 50 pounds since the previous visit. Claimant indicated he was attempting to work, but was "struggling" and Dr. Brunet ordered a FCE to be completed before he filled out Claimant's "disability papers." (CX-1, p. 23). The FCE had not been completed by June 26, 2003, at which time Claimant was instructed to "stop working" for four weeks until the results of a FCE could be reviewed. (CX-1, p. 15).

On April 1, 2004, Dr. Brunet reviewed the FCE of February

[9] At his deposition, Dr. Brunet stated Claimant could have worked within the limitations of light to medium activities by November 2000. However, the work status form dated November 27, 2000, specifically identified sedentary/light work. (EX-4, p. 13; CX-1, p. 44).

[10] Dr. Brunet testified that Claimant was disabled from performing "what he liked to do" in February 2001. He was then asked if he was aware that Claimant had undergone a FCE several years earlier. Upon agreeing that he was aware of the FCE, Dr. Brunet was asked to provide an opinion concerning Claimant's ability to perform restricted light or medium activities "at that time." However, from the manner of questioning, it is unclear whether "at that time" refers to February 2001 or the time when the previous FCE had been completed. (EX-4, pp. 15-16).

17, 2004, and opined Claimant could return to medium level work with the following limitations: frequent lifting of no more than 25 pounds, occasional lifting of no more than 50 pounds, and accommodations for his "decreased agility" and difficulty with prolonged standing and walking. (EX-3, p. 49).

On December 9, 2004, Claimant was working "off and on" at the convention center and was in school six times per week. Physical examination revealed "pretibial edema and some ankle edema." Dr. Brunet diagnosed Claimant with "degenerative joint disease in the right ankle" and recommended Claimant "continue working as tolerated." (CX-1, p. 2).

At his deposition, Dr. Brunet described Claimant's work level as "medium to light" and noted that his lifting restrictions fell within the medium level, while his walking and standing would be limited to a total of four hours each day with frequent breaks. (EX-4, p. 22). According to Dr. Brunet, Claimant's symptoms have increased during the course of treatment, but he anticipated increased objective changes in Claimant's x-rays. (EX-4, p. 23). Additionally, Claimant's attempts to return to work may have made him more symptomatic, but would not have worsened his condition. (EX-4, p. 24).

Ochsner Medical Institution

On October 26, 2000, Claimant presented with complaints of right leg and ankle pain, dizziness, and lightheadedness. (CX-3, p. 10). He was assessed with "major depressive disorder" and vertigo. (CX-3, p. 12).

On November 20, 2000, Claimant was seen for a follow-up on his nerve medication and "vision problem." (CX-3, p. 11). He was assessed with "major depressive disorder," right ankle pain, and back pain. (CX-3, p. 13). An x-ray of Claimant's lumbar spine revealed no significant degenerative change and "a very slight levoscoliosis of the lower thoracic spine." (CX-3, p. 4). An x-ray of his "T-spine" revealed mild degenerative changes; mild arthritis was noted as well. (CX-3, p. 5). An x-ray of Claimant's right ankle showed "postop changes with degenerative changes." The report also noted arthritis. (CX-3, p. 6).

On February 7, 2001, Claimant reported an injury to his left hand with soreness in one finger. (CX-3, p. 14). An x-ray revealed a "tiny fleck of metallic foreign body" in the soft tissue of his second finger. No acute fractures were observed.

(CX-3, p. 1). A work status form indicated Claimant was not able to return to work. (CX-3, p. 16). On March 13, 2001, Claimant returned to Ochsner with complaints of pain in his left hand and metal in his finger. (CX-3, p. 19). A work status form dated May 14, 2001, indicated Claimant could not return to work; however, the form instructed Claimant to see an orthopedist for release as Ochsner could no longer treat his "problem." (CX-3, p. 2).

The Vocational Evidence

Mr. Tommy Sanders

On August 30, 2004, Mr. Sanders generated a labor market survey regarding Claimant. (EX-17). Mr. Sanders reviewed the medical reports of Dr. Brunet dating from May 1997 through April 1, 2004. He also reviewed Dr. Brunet's July 2004 deposition. Mr. Sanders noted Claimant's February 2004 FCE indicated Claimant could perform "medium-heavy" work, yet it suggested Claimant could only return to medium level work. (EX-17, p. 15). He further noted Claimant could occasionally "lift approximately 46 to 66 pounds from various levels and his non-material abilities were noted to be either frequently or continuously." (EX-17, p. 15-16).

Mr. Sanders identified the following five available job positions in Slidell, Louisiana:

> (1) a full-time counter attendant at Advanced Auto Parts, who would assist with customer purchases and operate a cash register. He could alternate sitting, walking, and standing as needed. The position required reading and writing skills, as well as the ability to interpret auto parts books and manuals. Training was provided. The physical requirements included occasional lifting of 25 to 35 pounds, frequent lifting of 5 to 20 pounds, and overhead lifting of 2 to 10 pounds. The position paid $6.00 per hour. (EX-17, p. 16).
>
> (2) a cashier at Shell-Express in Slidell, Louisiana. The position provided training and the duties included activating gas pumps, restocking shelves, and operating a cash register. The physical requirements included occasional lifting of 20 pounds, frequent lifting of 2 to 10 pounds, overhead lifting of 2 to 5 pounds, and alternated sitting, standing, or walking. The position required "infrequent" bending, stooping, or squatting. The

job paid $6.00 per hour for 35+ hours each week. (EX-17, p. 16).

(3) a full-time cashier at Jubilee Convenience Store in Slidell, Louisiana. The duties were similar to those described for the position at Shell-Express and the wages were $6.00 per hour. (EX-17, p. 16).

(4) a cashier at BP Convenience Store in Slidell, Louisiana. The duties were similar to those described for the position at Shell-Express. The lifting requirements were occasional lifting of 20 pounds, frequent lifting of 5 to 15 pounds, and alternated sitting and standing. The position paid $6.00 per hour for a 32+ hour week. (EX-17, p. 17).

(5) a full-time groundskeeper at Slidell Memorial Hospital. The duties included cutting grass, trimming hedges, and weed eating. The employee would use a riding lawnmower and other lawn equipment. The physical requirements included frequent lifting of 5 to 25 pounds and pulling of 5 to 30 pounds. The position required occasional bending, stooping, squatting, and kneeling, along with alternated sitting, standing, and walking. The position paid $7.00 per hour. (EX-17, p. 17).

Mr. Sanders was unable to identify specific jobs that were available on or about February 12, 2001. However, he identified four potential employers that hire employees every one to three months. (EX-17, p. 17).

Functional Capacity Evaluation

On February 17, 2004, Claimant underwent a functional capacity evaluation (FCE). The FCE placed Claimant within a "medium-heavy physical demand category," but suggested he could "safely" return only to employment within a medium demand level. (CX-5, p. 1). Specifically, the FCE indicated Claimant could frequently lift 35 pounds to 50 pounds from various positions and could occasionally lift approximately 46 pounds to 60 pounds from various positions. Additionally, Claimant could frequently push or pull 27.5 pounds and could occasionally push or pull 36.6 pounds. As to his non-handling activities, the FCE determined Claimant could perform the following activities on a continuous basis: sitting, standing, trunk flexion and rotation, squatting, kneeling, walking, crawling, stair climbing, overhead work, and repetitive hand and foot use. Claimant could

"frequently" perform ladder climbing activities or balancing activities. (CX-5, p. 2).

The Contentions of the Parties

Claimant filed a Motion for Modification of the original Decision and Order in this case. Claimant contends he sustained a change in his condition and is entitled to additional disability benefits. Claimant contends he suffered from increased symptoms since the original hearing in this matter. Further, he contends he cannot return to pre-injury work and that Employer is required to establish suitable alternative employment. Claimant further argues he is entitled to disability compensation for the period of time during which he was incarcerated, as Employer failed to demonstrate available suitable alternative employment. Claimant disagrees with the contention that Employer overpaid Claimant's benefits. Claimant requests disability compensation from March 26, 1998 through August 30, 2004. In the alternative, he requests disability compensation from February 12, 2001 through August 30, 2004.

Employer contends modification is not warranted because Claimant has not sustained a change in his condition. Employer further contends it has identified suitable alternative employment within Claimant's restrictions and that Claimant failed to diligently seek alternative employment. Employer further argues Claimant has worked throughout the time between the original hearing and the instant hearing in this matter. Lastly, Employer contends it is entitled to a credit for overpayment of temporary total and permanent partial disability benefits, in the event Claimant is entitled to additional compensation benefits.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Applicability of Section 22 Modification

Section 22 of the Act provides the only means for changing otherwise final decisions on a claim; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995). The rationale for allowing modification of a previous compensation award is to render justice under the Act.

The party requesting modification has the burden of proof to show a mistake of fact or change in condition. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984).

An initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or that there has been a change in circumstances and/or conditions. Duran v. Interport Maintenance Corp., 27 BRBS 8 (1993); Jensen v. Weeks Marine, Incorporated, 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a mistake of fact or a change in physical or economic condition. Id. at 149.

It is well-established that Congress intended Section 22 modification to displace traditional notions of **res judicata**,

and to allow the fact-finder to consider any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon evidence initially submitted." O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 92 S.Ct. 405 (1971), reh'g denied, 404 U.S. 1053 (1972). An administrative law judge, as trier of fact, has broad discretion to modify a compensation order. Id.

A party may request modification of a prior award when a mistake of fact has occurred during the previous proceeding. O'Keefe, at 255. The scope of modification based on a mistake in fact is not limited to any particular kinds of factual errors. See Rambo I, at 295; Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 465, 88 S.Ct. 1140, 1144 (1968). However, it is clear that while an administrative law judge has the authority to reopen a case based on any mistake in fact, the exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice. Kinlaw v. Stevens Shipping and Terminal Company, 33 BRBS 68, 72 (1999). A mistake in fact does not automatically re-open a case under Section 22. The administrative law judge must balance the need to render justice against the need for finality in decision making. O'Keefe, supra; see also General Dynamics Corp. v. Director, OWCP [Woodberry], 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Modification based upon a change in conditions or circumstances has also been interpreted broadly. Rambo I, at 296. There are two recurring economic changes that permit a modification of a prior award: (1) the claimant alleges that employment opportunities previously considered suitable alternative are not suitable, or (2) the employer contends that suitable alternative employment has become available. Blake v. Ceres, Inc., 19 BRBS 219 (1987). A change in a claimant's earning capacity qualifies as a change in conditions under the Act. Rambo I, at 296. Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. See Rambo I, 515 U.S. at 296, 30 BRBS at 3 (CRT); Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998); Vasquez, 23 BRBS at 431.

However, Section 22 is not intended as a basis for re-trying or litigating issues that could have been raised in the initial proceeding or for correcting litigation

strategy/tactics, errors or misjudgments of counsel. General Dynamics Corp. v. Director, OWCP [Woodberry], supra, McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); Delay v. Jones Washington Stevedoring Company, supra, at 204.

The Department of Labor (DOL) has consistently advanced a view that Section 22 articulates a preference for accuracy over finality in judicial decision making. See Kinlaw, at 71; Old Ben Coal Company v. Director, OWCP [Hilliard], 292 F.3d 533, 36 BRBS 35, 40-41 (CRT)(7th Cir. 2001). DOL has maintained in other modification proceedings that as Section 22 was intended to broadly vitiate ordinary **res judicata** principles, the interest in "getting it right," even belatedly, will almost invariably outweigh the interest in finality. Kinlaw, at 71.

B. The Threshold Requirement under Section 22 of the Act

I find that Claimant has met the threshold requirement for modification under Section 22 of the Act by presenting a change in Claimant's physical condition. Subsequent to the issuance of the original Decision and Order in this matter, Claimant underwent surgery involving the removal of hardware in his right ankle on June 26, 1997. Dr. Brunet placed Claimant at MMI from the June 1997 surgery on September 11, 1997, and assigned a permanent impairment rating of 25% to Claimant's right ankle. I find this sufficient to constitute a change in Claimant's physical condition as Claimant was previously assigned a permanent partial impairment rating of 30% to his ankle at the time of the original hearing. Consequently, I find and conclude that Claimant has presented new information to warrant consideration of modification under Section 22 of the Act. Therefore, balancing the need to render justice under the Act against the need for finality in decision making, I hereby grant Claimant's motion and reopen the record to consider modification of the prior Decision and Order.

C. Nature and Extent of Disability

The parties stipulated at the time of original hearing that Claimant injured his right ankle during the course and scope of employment with Employer. Thus, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The

permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

If the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of his average weekly wage for a specific number of weeks, regardless of whether his earning capacity has been impaired. See Henry v. George Hyman Construction Co., 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984).

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is

totally disabled. Potomac Elec. Power Co. v. Director OWCP, 449 U.S. 268, 277 n.17, 14 BRBS 363 (1980)(herein "PEPCO"); Davenport v. Daytona Marine & Boat Works, 16 BRBS 168, 173 (1984). Unless the worker is totally disabled, however, he is limited to the compensation provided by the appropriate schedule provision. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

June 26, 1997 through September 10, 1997

On June 26, 1997, Dr. Dickson performed a hardware removal surgery on Claimant's "right tibia." Although Dr. Dickson's medical reports are absent from the record, as are any work status forms specifically stating Claimant could not return to work, I nonetheless find that Claimant was totally disabled during his convalescence from surgery. An office note dated June 19, 1997, from Dr. Brunet states that Claimant would require crutches for six weeks following surgery and indicates that "[h]e will not be able to do anything during that period of time." Further, on September 11, 1997, Dr. Brunet indicated that Claimant could "return to some form of vocation . . . ." Based on the medical reports of Dr. Brunet, I find and conclude Claimant was restricted from performing any kind of work during the period between his June 19, 1997 surgery and his release to work on September 11, 1997, despite the absence of an actual work status form. As Claimant had not reached MMI and was unable to return to employment, including his former employment, I find and conclude Claimant is entitled to permanent total disability benefits from June 26, 1997 through September 10, 1997, based on an average weekly wage of $559.67.[11] It is noted that Employer paid temporary total disability benefits from June 26, 1997 through March 15, 1998. Accordingly, I find Employer is entitled to a credit for benefits overpaid after September 10, 1997.

September 11, 1997 through February 6, 2001

The parties stipulated Claimant reached MMI on September 11, 1997. A medical report by Dr. Brunet placed Claimant at MMI on September 11, 1997 and assigned a 25% permanent impairment to his entire lower right extremity. Consequently, I find and conclude the record supports the parties' stipulated date of MMI.

At his deposition, Dr. Brunet testified that he

[11] In the original decision and order, I found Claimant reached maximum medical improvement on June 7, 1995. Although the subsequent surgery created a period of temporary disability, Claimant was not rendered temporarily disabled. The underlying permanent disability is not altered during a period of temporary disability covered by subsequent related surgery and convalescent care. See Carlisle v. Bunge Corporation, 33 BRBS 133 (1999); Delay v. Jones Washington Stevedoring Company, 31 BRBS 197, 200-201 (1998); Leech v. Service Engineering Co., 15 BRBS 18 (1982). Therefore, it is axiomatic that once a claimant has a permanent impairment/disability his status remains permanent. See Davenport v. Apex Decorating Company, Incorporated, 18 BRBS 194, 196-197 (1986).

"reluctantly agreed" to allow Claimant to return to some "roofing" activities in late 1997 or early 1998, although he did not believe Claimant could tolerate such work. In a medical report dated September 11, 1997, Dr. Brunet released Claimant to "some form of vocation," noting that Claimant's activities would be limited and that he could not likely perform his prior work as a carpenter without modifications. Dr. Brunet specifically opined Claimant could perform "light to medium type work activity with some breaks from prolonged standing." In March 1998, Dr. Brunet opined Claimant could "return to some form of vocation, but would be relegated to light activity that does not require agility, prolonged walking or standing." He maintained his opinion regarding Claimant's work capacity in August, September, and November 1998. In May 1999 and November 2000, Dr. Brunet signed work status forms which limited Claimant to "sedentary/light" activities.

Based on Dr. Brunet's releases of Claimant to medium to light to sedentary activities, I find Claimant retained residual and transferable work skills and capabilities. While Dr. Brunet's opinions clearly indicated Claimant could not return to his prior employment, I find Claimant maintained an ability to return to some level of employment activity, varying from medium to sedentary work. Consequently, I find and conclude Claimant was not totally disabled and is only entitled to a permanent partial disability award from September 11, 1998 through February 6, 2001. Although not specifically referred to in the Act, jurisprudence has held an ankle injury to fall within the guise of a scheduled foot injury under Section 8(c)(4). Michael v. Sun Shipbuilding & Dry Dock Co., 7 BRBS 5 (1977); Tangarra v. Nt'l Steel & Shipbuilding Co., 6 BRBS 427 (1977), aff'd and vac'd in part, 607 F.2d 1009 (9th Cir. 1979).

The original Decision and Order in this matter awarded Claimant 61.5 weeks of compensation after June 7, 1995 for a permanent partial impairment of 30% to his right ankle due to the instant injury (the total amount of weeks awarded compensation for the loss of a foot under the Act (205), multiplied by the percentage of impairment (30%)). For that reason, I find and conclude Claimant is not entitled to additional permanent partial disability benefits for his scheduled ankle injury, as he has already received such compensation in accordance with the original Decision and Order in this matter.[12]

[12] The employment and personnel records submitted by Employer indicated that Claimant worked from April 1998 to February 2001. Claimant was entitled to

February 7, 2001 through May 13, 2001

In February 2001, Claimant's physician at Ochsner Medical Institute and Dr. Brunet each signed work status forms that indicated Claimant was unable to work. The testimony of both Dr. Brunet and Claimant indicate that Dr. Brunet did not restrict Claimant from all forms of employment, but only restricted Claimant from performing his usual carpentry work.[13] However, unlike the work status form signed by Dr. Brunet, there was no subsequent qualification of the restriction assigned by the physician at Ochsner Medical Institute and Claimant was simply "not able to work at [that] time," according to the work status form.

Based on the Ochsner Medical Institute record, I find and conclude Claimant could not return to any form of employment from February 7, 2001 until May 13, 2001, and was permanently totally disabled during that time and entitled to permanent total disability compensation based on an average weekly wage of $559.67.

May 14, 2001 through June 25, 2003

A second work status form issued by Ochsner Medical Institute on May 14, 2001, indicated Claimant could not return to work, but further indicated that Claimant should see an orthopedist for a release to work. Dr. Brunet previously had restricted Claimant from performing only his usual profession in February 2001. Further, he testified that his March and October 2001 opinions disabled Claimant from working at his usual profession, but did not disable Claimant from performing other vocations within his physical limitations. Accordingly, I find and conclude Claimant was capable of returning to some form of employment from May 14, 2001 through June 25, 2003.

Based on the foregoing, I find and conclude Claimant was permanently partially disabled from May 14, 2001 through June 25, 2003. I further find and conclude Claimant has been compensated for his scheduled injury, pursuant to the original

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only scheduled disability benefits during this period of time and his work efforts during this period would not affect his entitlement to such benefits.

[13] It is noted that Dr. Brunet did not discuss or reference the actual work status forms of November 2000 or February 12, 2001, during his deposition. Consequently, there is no discussion of the "sedentary/light" restriction of November 2000 or the fact that "unable to work" had been checked on the February 2001 form. However, given Claimant's testimony that Dr. Brunet only restricted his employment in the carpentry profession, I find that Claimant could return to some form of vocation.

Decision and Order in this matter. Accordingly, I find and conclude no additional permanent partial disability compensation is due to Claimant for his work-related ankle injury. Because Claimant is limited to scheduled disability compensation which has already been paid by Employer, I further find and conclude Claimant is not entitled to any disability benefits during a period of incarceration from November 2001 through January 2003.

June 26, 2003 through March 31, 2004

The record contains a medical report from Dr. Brunet dated June 26, 2003, in which Claimant was instructed to "stop working" for four weeks pending an FCE. Dr. Brunet further indicated he would not fill out Claimant's disability papers until the results of the FCE had been reviewed. There is no further explanation of the work restriction; consequently, I find and conclude Claimant was permanently totally disabled and unable to work at any vocation pending a release after review of his FCE on April 1, 2004.

Based on the foregoing, I find and conclude Claimant is entitled to permanent total disability benefits from June 26, 2003 through March 31, 2004 based on an average weekly wage of $559.67.

The employment and personnel records submitted by Employer indicate Claimant worked 34.5 hours in March 2004. As Claimant was not released to return to work until April 1, 2004, I find that the work performed during March 2004 could not be suitable alternative employment which would reduce Employer's liability for total disability payments.

April 1, 2004 through present and continuing

On April 1, 2004, Dr. Brunet reviewed the results of the FCE performed on February 17, 2004, and released Claimant to return to work at medium level duty. Dr. Brunet noted Claimant's employment would also have to accommodate his "decreased agility" and "difficulty with prolonged walking and standing."

Based on Dr. Brunet's release of Claimant to medium level duty with restrictions, I find that Claimant is entitled to permanent partial disability for his scheduled injury. I further find Employer demonstrated suitable alternative employment through the vocational survey dated August 30, 2004, which identified three cashier positions and one counter

attendant position. I find the three positions complied with Claimant's lifting requirements and allowed for alternated sitting, standing, and walking. As Claimant testified that he will not attempt to perform employment with wages of $6.00 per hour, I also find and conclude Claimant has not shown reasonable diligence to secure employment, further precluding him from entitlement to total disability benefits. See New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-1043 (5th Cir. 1981); P & M Crane Co. v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991).

Based on the foregoing, I find and conclude Claimant is entitled to scheduled permanent partial disability benefits for his ankle injury from April 1, 2004 through present and continuing. I further find and conclude Claimant has already been fully compensated for his scheduled injury pursuant to the original Decision and Order in this matter. Accordingly, I find and conclude that no additional permanent partial disability compensation is due to Claimant for his work-related ankle injury.

E. Entitlement to Credit

Employer contends it is entitled to a credit for overpayment of compensation benefits. An LS-206 form indicates Employer paid temporary total disability benefits to Claimant from June 26, 1997 through March 15, 1998. I agree that this constitutes an overpayment of benefits. Claimant was only entitled to scheduled permanent partial disability compensation between the dates of September 11, 1997 and February 6, 2001, As Claimant had already received his scheduled compensation pursuant to the original Decision and Order, any temporary total disability compensation received between September 11, 1997 and March 18, 1998, is an overpayment on the part of Employer.

Employer further contends Claimant received an overpayment of scheduled disability benefits because his permanent impairment was reduced from 30% to 25%. As the medical reports of record support Employer's contention, I find Employer is entitled to a credit for the 5% overpayment of scheduled permanent partial disability compensation.

A modification order decreasing compensation may not affect any compensation previously paid, although an employer is entitled to credit any excess payments already made against any compensation as yet unpaid. See 33 U.S.C. §914(j). As Claimant is due additional compensation for periods of permanent total

disability, I find and conclude Employer is entitled to a credit for the foregoing overpayments of compensation made to Claimant.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

Claimant submitted several unpaid medical bills from Tulane Hospital, along with a request for reimbursement of mileage for travel to and from treatment. The mileage request identifies seven visits at 97 miles, roundtrip. I find this to be reasonable as Claimant lives in Slidell, Louisiana, and his treating physician is located in New Orleans, Louisiana. Accordingly, Employer remains responsible for any past, present, and future reasonable and necessary medical bills, including

mileage arising from Claimant's work-related right ankle injury.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[14] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Claimant's request for modification is **DENIED** in part and **GRANTED** in part.

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from June 26, 1997 to September 10, 1997, from February 7, 2001 to May 13, 2001, and from June 26, 2003 to March 31, 2004, based on Claimant's average weekly wage of $559.67, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

3. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the

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[14] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant **is entitled to a fee award for services** rendered after **April 19, 2004**, the date this matter was referred from the District Director.

Act effective October 1, 2003, for the applicable period of permanent total disability.

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's November 15, 1993 work-related right ankle injury, pursuant to the provisions of Section 7 of the Act.

5. Employer shall receive credit for compensation heretofore paid, as and when paid, as reflected in this Decision and Order.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 21st day of June, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge